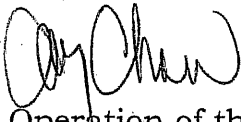


City of Sunnyvale  
Department of Public Works  
Memorandum

May 23, 2006

To: Mayor and City Council

From: Amy Chan, City Manager 

Subject: Request for Proposals for Operation of the SMaRT Station®  
--Wage Issues

Background

The City's seven-year contract with GreenTeam/Zanker (GT/Z) for operation of the Sunnyvale Materials Recovery and Transfer Station (SMaRT Station) expires on December 31, 2007. The SMaRT Station, located at 301 Carl Road, receives refuse from Sunnyvale, Mountain View and Palo Alto, processes it to recover recyclable materials, and transfers the residue 27 miles to the Kirby Canyon Landfill.

In anticipation of the end of the current contract, the Public Works Department staff is preparing a Request for Proposals (RFP) that will soon be distributed to interested parties in the solid waste management industry. Included in the RFP is the operations contract that proposers will be asked to sign if awarded the contract by Council. The contract locks a proposer into a payment amount that is fixed for the seven-year term but that is adjusted each year by the percent change in a Consumer Price Index, the Bay Area All Urban Consumers index.

At a Study Session held on March 21, 2006, Council gave staff direction with regard to key contract issues and the draft RFP reflects that direction.

How high to set the minimum floor for SMaRT Station worker wages is one of those key contract issues. On the topic of prevailing wages for the workers at the SMaRT Station, the Council's March 21 guidance was to tell proposers to plan on paying wages at least as high as those determined as "prevailing" in the labor market, based on wage determinations from an impartial third party state agency, the California Department of Industrial Relations (DIR). The City has in hand such a February 28, 2006 wage determination that states the wages as of May 2004. This determination (updated to reflect subsequent correspondence from DIR that corrected two numerical errors) is attached to the draft RFP and tells the proposers the minimum acceptable wages to be paid.

As Council is aware, GT/Z intends to challenge the DIR determination for a variety of reasons. It is possible that either this challenge or a separate, subsequent determination could raise or lower the prevailing wages applicable to the SMaRT Station.

Todd Storti's May 16, 2006 letter to the City Council requesting a continuance of the SMaRT Station RFP refers to a lawsuit filed by the Teamsters against GT/Z to enforce a prevailing wage contract provision. He indicated that the lawsuit was dismissed because the City's prevailing wage contract provisions are preempted by federal law. While the legal issues involved in that suit are very complex, the short answer is that the City was not a party to that litigation, the case may still be subject to an appeal, and in the City Attorney's opinion that litigation does not limit the City's ability to include the prevailing wage provision in the RFP and would not unless there is a subsequent adverse appeal court ruling.

Because contractors proposing pricing are exposed to the risk that the DIR could issue a subsequent determination with higher wage levels, the RFP includes a formula that defines that risk and caps it in such a situation. This formula allows prevailing wages to rise, but defines an upward limit on the cost the City's residents and businesses (its ratepayers) may expect to pay as a result. Specifically, the formula calls for a wage increase each July 1 of 3%, plus the rate of CPI increase in the contractor's payment, until any new prevailing wage level is reached.

Thus, the "most cost" risk to the contractor and the City's ratepayers could be predicted and planned for in the budgets of the City's Solid Waste enterprise fund and its customers, the residents and businesses, large and small.

#### Recent Events Related to the RFP

On May 16, Council was scheduled to consider whether to direct staff to issue the RFP to solid waste industry companies interested in proposing to operate the SMaRT Station from 2008-2014. On that date, Council agreed to a request by the incumbent operator, GT/Z, to delay the item and it was rescheduled to be heard during the Council Budget Workshop on May 23 at 5 p.m.

Subsequently, representatives of Teamsters Local 350, based in San Francisco, contacted Council and the City Manager. Local 350 represents three bargaining units made up of GT/Z workers at the SMaRT Station. None of the three bargaining units currently has a labor agreement in place with GT/Z.

In a meeting with the City Manager on Thursday, May 18, the Teamster representatives presented a copy of RFP documents used by the City of San Jose in its current RFP process to award a new contract for collection of refuse. The Teamsters requested that Sunnyvale's RFP for SMaRT Station operations be modified to include the San Jose provisions.

#### San Jose Provisions

Staff has reviewed the San Jose provisions and finds that they are not applicable to Sunnyvale and are in direct conflict with prudent fiscal management of the City.

San Jose's RFP supposes that the garbage collection work being performed is so essential to the interests of the City that there must be "labor peace," that is, no possibility of a labor dispute during the term of the collection contract<sup>1</sup>. This supposition is based on four factors:

1. "The service or labor will be provided on City site or a site which is important to the proprietary interests of the City;
2. The service provider relies on a significant amount of public patronage
3. The economic effect of any disruption of City expenditures or revenues is significant
4. The effect of any disruption on the citizens, tourists and businesses in the community is significant."

Based on the assumption that all four of the factors above are present, San Jose allows prevailing wages to be set solely based on the existence of a collective bargaining agreement between the City's contractor and a labor union that represents the workers who perform services under the contract with the City.<sup>2</sup> In other words, the contractor and the union set the wages at any level they wish, even though it is the City and its ratepayers who end up paying the cost.

However, only one of San Jose's four factors (the first one) is present in the case of the contract for SMaRT Station operations. This factor is present because the service will be provided at the SMaRT Station, a City-owned facility.

Regarding the second factor, "public patronage," the SMaRT Station is little seen by the public. Only 2% of the material received at SMaRT in FY 2004/05 was delivered by members of the public, with the other 98% delivered by the hauling companies under contract with the three

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<sup>1</sup> San Jose Recycle Plus RFP #05-06-09, Exhibit 12.I.G, Labor Peace

<sup>2</sup> San Jose Recycle Plus RFP #05-06-09, Exhibit 12 I.A, Prevailing Wage Policy

Participating Agencies (Mountain View, Palo Alto and Sunnyvale) and employees of the cities. Most Sunnyvale residents have never been to the SMaRT Station and many are not even aware that it exists.

Factor three, City economic disruption, has been a non-issue when the SMaRT Station has been the subject of past labor actions, including a multi-day strike in 2005. The City suffered no economic disruptions as a result of those actions. The SMaRT Station operations contract requires that the contractor continue to operate SMaRT during a labor action. Both GT/Z and a previous SMaRT operator have successfully operated the facility throughout various labor actions. It takes a relatively small number of employees to carry out the essential functions of the SMaRT Station and any extra cost of doing so is the responsibility of the contractor, not the City. Failure by the contractor to meet the standards of the contract (which include clearing the garbage from the transfer station floor every 24 hour hours) makes it liable to pay liquidated damages to the City for any direct or indirect costs to the three partner cities and their residents.

Although the Teamster employees of Specialty Solid Waste, which collects garbage in Sunnyvale, and the collector for Mountain View will not cross a picket line at the SMaRT Station, both collection companies have contingency plans in place that allow garbage trucks to be dumped at SMaRT. The employees of the Palo Alto collection collector are non-union and their work is unaffected by a labor action or picket line. As a result, there has been no disruption of refuse collection in any of the three SMaRT Station partner cities as a result of past labor actions.

Factor four, effects on "citizens, tourists and businesses" is also not present. Labor actions at the SMaRT Station have had no significant effects on tourists, residents or businesses. As noted above, solid waste collections have not been noticeably affected. If, for any reason, the SMaRT Station contractor is unable to operate the facility, the City itself has a contingency plan that can be activated immediately. That plan provides for the operation of the SMaRT Station by City forces.

Even if the four factors cited by San Jose for its collection contract were present in Sunnyvale, the validity of the San Jose approach would still be in question due to its anti-competitive effects as well as the importance of prudent fiscal management.

As reported in the San Jose Mercury News on May 15, 2006<sup>3</sup>, the “labor peace” feature of the San Jose RFP is creating a bidding process in San Jose where there is little if any competition to provide trash service at lower wages than the Teamsters are proposing. This is because the Teamsters and Norcal Waste Systems reached a pre-emptive labor agreement that increases wages and provides for a four percent annual wage increase, as well as other benefits. The San Jose process appears to have raised the cost and reduced the competition, at the expense of the ratepayers, who will pay any increased cost in their garbage bills.

As it happens, only one of the four factors is present and that one simply because we own the SMaRT Station. San Jose’s justification for “labor peace” is not relevant to our situation in Sunnyvale yet has the potential to impose financial burdens on Sunnyvale ratepayers.

Other San Jose RFP provisions that the Teamsters requested be included in the SMaRT Station RFP were:

- City must evaluate proposals based on the proposers’ “commitments to labor peace and how the Proposer will protect against labor discord during the terms of the Agreement; Previous history as an employer; and Previous labor relations history.”
- New contractor must retain non-management employees of the outgoing contractor
- Proposers must provide an “Employee and Labor Relations” plan that describes how it will implement the “labor peace” items
- If Contractor fails to pay prevailing wages, it must pay liquidated damages that are three times the difference between the prevailing wages and the actual wages [Note that this provision contains an internal contradiction and is probably unusable. Contracts may use liquidated damages where the actual monetary damage of the contractor’s failure is impossible or impractical to calculate—But to calculate the amount of liquidated damages to charge for this failure would require calculating the actual charges—a logical and legal contradiction.]

Staff does not recommend that the SMaRT Station RFP be modified to mirror the San Jose provisions. If it were to do so, Council would be moving into an uncharted policy area with huge potential financial ramifications because it could be setting a precedent for the many other service contracts into which the City enters. However, if the Council wishes to examine this issue, I recommend that it do so in a comprehensive and deliberate way that takes into account all of the

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<sup>3</sup> Union Deal Draws Fire – City Trash Hauler’s Latest Bid Clouded by Link With Teamsters (San Jose Mercury News, May 15, 2006)

impacts, financial and otherwise, to the City throughout the 10- and 20-year financial plans. This could be done by placing this budget issue on the list for consideration in the upcoming Budget and Study Issue Process.

If Council is interested in exploring the concept of allowing the contractor to set wages and benefits without cost limits, that decision can still be made as part of the process of awarding this contract. However, it would be necessary to extend the current operation contract with GT/Z to accommodate the necessary delay because the current project schedule does not contain sufficient time to study the issue and still put the new contract in place by January 1, 2008. However, the current contract does allow the City to extend its term by up to one year, with the same provisions, by giving notice of that intent by June 30, 2007. Doing so would allow the RFP process to be delayed to study this issue.

#### Discussion of Prevailing Wage Alternatives

Due to the questions that have been raised concerning administration of wages in the contract, staff felt it was prudent to provide the City Council with alternatives that would help to better understand the complexities of this issue and at the City Council's discretion could be incorporated into the RFP and contract. In addition to the original staff recommendation (Alternative 1), three other alternatives are discussed below (Alternatives 2-4).

#### **Alternative 1- Retain the current Prevailing Wage language and issue the RFP**

##### Pros:

- Workers will be paid prevailing wages as determined by an impartial third party (DIR)
- If DIR issues a new determination that raises wages, workers will receive raises that in a measured and predetermined way bring wages to the new prevailing wage
- Proposers/contractor will no longer have an undefined, unlimited potential cost for higher wages if DIR issues a new determination
- Proposers can build a "highest labor cost" scenario into their proposals
- Ratepayers are protected from the potential for large, unexpected rate increases caused by changes in prevailing wages

##### Cons:

- Not the approach favored by the Teamsters
- Proposers will incorporate some risk of future wage increases into their pricing (at ratepayer expense) whether or not wages are actually increased

**Alternative 2 - Modify the current Prevailing Wage language and issue the RFP to:**

- **Inflate the DIR determination to bring wages to 2006 levels and**
- **Require annual CPI-based wage increases**

**Pros:**

- Workers will be paid prevailing wages that are based on a determination by an impartial third party (DIR) inflated to current levels
- Proposers can accurately project initial wage costs
- Proposers are at little risk from annual wage increases because contractor payment increases annually based on the same CPI

**Cons:**

- Will raise cost to City ratepayers by approximately \$236,000 per year (plus CPI) when compared to Alternative 1 due to the initial 2004-2006 CPI adjustment

**Alternative 3 - Adopt the San Jose approach to Prevailing Wages and issue the RFP**

**Pros:**

- Is the approach favored by the Teamsters
- Minimizes chances that SMaRT operations will be affected by a labor action

**Cons:**

- Allows contractor(s) and labor union unlimited ability to increase wages, the largest cost component of SMaRT Station operation
- Limits City ability to control which company will operate SMaRT
- Ratepayers (as represented by City Council) have no control over largest cost component of SMaRT Station operation but must pay costs
- Limits RFP competition to those companies that agree to pay wages demanded by labor union

**Alternative 4 - Cancel the RFP and operate the SMaRT Station with City forces beginning in January 2008**

**Pros:**

- Provides City with maximum control over wages, finances, work practices, facility maintenance and cleanliness

**Cons:**

- Likely to be more expensive than contract operation, based on past comparisons of the cost of City operations in the area of solid waste management operating contracts

- The city may be required to bargain with the prior collective bargaining representative of the former employer
- Civil service personnel procedures hamper ability to keep high-turnover positions consistently filled

#### Alternative Courses of Actions

Staff has identified four potential courses of action for the Council to consider.

1. Retain the current Prevailing Wage language and issue the RFP
2. Modify the current Prevailing Wage language and issue the RFP to:
  - Inflate the DIR determination to bring wages to 2006 levels and
  - Require annual CPI-based wage increases
3. Adopt the San Jose approach to Prevailing Wages and issue the RFP
4. Cancel the RFP and operate the SMaRT Station with City forces beginning in January 2008

#### Recommendation

Staff recommends Alternative 1. If the Council wishes to consider a different course of action, Alternative 2 is a viable alternative.

Attachments – Union Deal Draws Fire – City Trash Hauler's Latest Bid Clouded by Link With Teamsters (San Jose Mercury News, May 15, 2006)



Paper: San Jose Mercury News (CA)

Title: UNION DEAL DRAWS FIRE - CITY TRASH HAULER'S LATEST BID CLOUDED BY LINK WITH TEAMSTERS

Date: May 15, 2006

The last time San Jose got a new garbage-hauling contract, it ended up paying for all sorts of unexpected labor costs. That debacle led to accusations of secret deal-making, a reprimand for the mayor and an ongoing grand jury investigation.

This time around, labor costs shouldn't be a surprise. That's because Norcal Waste Systems, the current contract holder that was embroiled in a controversy over its last deal, wanted more certainty when it rebid recently for the city's biggest trash contract.

So Norcal asked the **Teamsters** union, which represents the majority of workers who would be affected, what terms would be acceptable over the city's six-year contract.

The **Teamsters** reached an understanding with Norcal for its workers to receive a 4 percent annual wage increase, as well as other benefits. Norcal agreed, and the **Teamsters** have been urging other bidders to do the same, through memorandums of understanding. At least two other bidders have declined, though one said his company has factored the **Teamsters'** wishes into its bid.

But some critics say the **Teamsters'** effort to lock in its labor terms is creating a different problem: a bidding process where there's little if any competition to provide trash service at lower wages than the **Teamsters** are proposing.

They fear that if the process isn't competitive enough, San Jose garbage customers could pay the price through higher rates.

"The process is supposed to be competitive," Councilman and mayoral candidate Chuck Reed said.

San Jose's environmental services department has already projected increases in garbage rates over the next several years to cover a variety of expected cost increases. It was not clear last week whether the **Teamsters'** proposed terms were in line with what the city had already anticipated.

Some bidders approached by the **Teamsters** said the union leaders left the strong impression that if their companies don't agree to the rate increases, they risk losing the contract because the city requires bidders to prove that their labor practices will maintain "labor peace."

Details concern

"It sounds a little bit like coercion," said Councilman Dave Cortese, also a mayoral candidate.

"Because the city has a 'labor peace' provision, (the contractors) are almost bound to pay" what the **Teamsters** want, Reed said.

**Teamsters** President Bob Morales did not return a call requesting comment.

Phaedra Ellis-Lamkins, executive officer of the South Bay Labor Council, said such pre-bid arrangements are common in city and private contracts around the Bay Area, including past contracts for construction or services at Mineta San Jose International Airport. She said it's a way for bidders to get a firm handle on their future labor costs, the same way a contractor might try to nail down the cost of steel over the life of a construction contract.

What's more, Ellis-Lamkins and others said, bidders have very little leeway to propose vastly lower labor rates anyway. That's because two other city policies require new contractors to continue using the workers doing the job now, and to pay them at least the "prevailing wage" they are receiving.

Memo from manager

In a May 5 memo to city council members, City Manager Les White alerted the council that if the **Teamsters** get the wages they want over the next few years, it "may prove problematic" because the wage costs would almost certainly jump for the city's other primary hauler, Green Team of San Jose.

Unlike Norcal's contract, which the city chose not to extend on current terms past June 2007, Green Team's contract extends until at least mid-2010. Green Team isn't entitled to a higher reimbursement from San Jose just because its labor costs rise.

But several observers noted Green Team could argue that because Norcal in 2004 got its highly controversial contract amendment for extra labor costs, Green Team should, too.

"The city seems to have painted itself into an interesting corner," said former city attorney Joan Gallo, who is now an attorney with Hopkins & Carley.

In the years after Norcal won its current contract in 2000 to collect trash and recyclable materials, Mayor Ron Gonzales got into hot water after helping Norcal secure a contract amendment entitling it to \$11.25 million in extra labor costs not in its original bid.

The mayor was censured last December for failing to fully explain to the council members in 2003 that the rate increase they approved was partly to fund that contract amendment. Since the censure, the Santa Clara County district attorney has been investigating the matter through a civil grand jury to determine whether any laws were broken by the mayor or others. Gonzales says he did not break any laws.

Mark Arsenault, general manager of Norcal's San Jose operations, said Norcal appreciates knowing up front what its labor costs will be, especially given such history, and given San Jose's strong labor policies.

"The reason we did it was two words: labor peace," Arsenault said.

Vice Mayor Cindy Chavez, also a mayoral candidate, said she didn't know about the **Teamsters'** recent dealings with bidders, but said she will be evaluating bids based on service, a fair price and meeting state obligations.

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